Highway Drug Courier Profiles in Y2K: Another Nail in the Coffin of the Fourth Amendment?

By Diana Lee Patton, Deputy Legal Defender

He who is willing to sacrifice freedom for security soon has neither.[1]

Despite editorial page hype that the war on drugs is lost, the typical United States citizen continues to acquiesce to governmental erosion of his right to be free from unreasonable search and seizure, in the hopes that relinquishing some freedoms will help law enforcement win the war. The violence done to the Fourth Amendment in the name of stemming drug trafficking[2] has been even more serious than that visited upon it by the motor vehicle[3] cases in the 70's. Thus, it stands to reason that when drug trafficking and motor vehicles are joined as a single search and seizure issue, the Fourth Amendment will suffer accordingly. But, at least for now, it is still possible to challenge detentions of motorists based on profiling of what a drug courier is supposed to "look like."

The highway "drug courier profile" is a "rather loosely formulated listed of characteristics" used by law enforcement to distinguish those who are carrying narcotics from the innocent traveling public.[4] It was derived from the DEA's airport drug courier profiles of the 70's and 80's, which in turn were based upon the FAA' s skyjacker profile devised in the 60's and 70's.[5] The skyjacker profile alone was based on information compiled according to scientific method; the drug courier profiles are based upon collective experiences of law enforcement agencies.

Among highway drug courier profile characteristics are: appearing to be a foreigner;[6] driving a one-way rental car;[7] paying for the rental car with cash[8] or with someone else's credit card;[9] traveling across country;[10] carrying a small amount of luggage;[11] appearing to be nervous and in a hurry when stopped by police;[12] driving below the speed limit;[13] driving above the speed limit;[14] looking at the police vehicle;[15] not looking at the police vehicle;[16] traveling on a route known to be used by drug couriers;[17] driving a late model car[18] or large luxury car;[19] traveling late at night or early in the morning;[20] appearing to be a husband and wife team of Spanish descent;[21] driving a car while wearing jeans with a tie, being nervous, not making eye contact, coming from a "source" city, and placing the car's registration on the passenger seat;[22] driving a dirty car;[23] and driving a clean car.[24]

Courts usually hold that a match between the suspect's appearance and profile factors can be considered reasonable suspicion to briefly detain the person and investigate further, but all are in agreement that the profile cannot amount to probable cause to search the car.[25] One court dismissed the drug courier profile as a "classic example of those 'inarticulate hunches' that are insufficient to justify a seizure under the fourth amendment."[26] Courts seem to have two main objections to the drug courier profile: (1) many factors also resemble innocent, lawful behavior;[27] and (2) the "drug courier profile has a chameleon-like quality; it seems to change itself to fit the facts of each case."[28]

The most recent Arizona cases are *State v. Magner*,[29] in which the detention was held illegal, and *State v. Omeara*,[30] in which the detention and search were upheld.

In *Magner***,** defendant was pulled over on Interstate 40 outside of Flagstaff for driving 71 mph in a 65 mph zone. During the stop and preparation of a written warning, the officer observed the following: (1) Mr. Magner avoided eye contact, (2) he flinched the one time that he did make eye contact ("nervous"), (3) he was unusually upset about the stop, (4) he wore sneakers and jeans with a tie ("attempting to present as a businessman to any passing patrolman"), (5) the car's registration was on the seat, not in the glove compartment (causing the officer to "wonder whether defendant had a gun in the glove box"), (6) Mr. Magner was traveling from Tucson ("a known source for illegal drugs"), (7) the car was dirty ("travel from Point A to Point B as fast as they can without cleaning their cars"), and (8) an overnight bag was on the seat ("to keep the contents of the trunk hidden").[31]

The court addressed each one of these observations individually, and offered all kinds of innocent explanations for them – e.g., nearly everyone is nervous while being stopped by a policeman, and avoiding eye contact did not fall into the category of "dramatic nervousness."[32] The court also observed that the registration on the front seat should not have prompted suspicion, since the officer never asked the defendant why it was there as opposed to somewhere else – it could have been removed from its usual place in preparation for the traffic stop itself. Because the officer did not ask, his assumption that there might be a gun in the glove compartment was unreasonable. With regard to defendant's choice of apparel, the court was willing only to say that wearing a tie on a cross-country trip seemed "unusual," but again, without the officer inquiring, could not be considered "suspicious." That the officer believed Tucson was a "source city" for drugs was discarded with little discussion, as

defendant had given an adequate explanation of his presence there. The court also declined to find a dirty car suspicious in the middle of a long trip, as it would make more sense to clean the car at the end of the trip.[33] Lastly, while the court found the officer's inference reasonable that the overnight bag was on the seat because drugs occupied the trunk, they found it equally reasonable that the bag was there for "easy access to items such as a shaving kit or toothbrush."[34]

The court concluded that the traffic stop for speeding was legitimate, but further detention was unjustified:

> [The officer] would have been authorized to continue defendant's detention for a brief period to ask further questions about the circumstances [the officer] deemed suspicious. [Cites omitted.] However, [the officer] asked further questions only with respect to defendant's visit in Tucson, which produced nothing to enhance the suspicion of criminal activity. [Cites omitted.] The end result, when evaluating all of [the officer's] observations, together with the unclarified inferences from those observations, is that *[the officer] had no more than a "hunch" that defendant was involved in transporting drugs. This is not enough under the Fourth Amendment to justify defendant's detention.*[35]

Thus, your motion to suppress always should point out that although the drug courier profile can add up to reasonable suspicion, once the officer decides to investigate further, *he'd better investigate further,*[36] not just snoop around for more drug courier factors, or the detention may be illegal. Remember, the drug courier profile *never* supports probable cause to search.

The *Omeara* case presented a different fact pattern, and that is why it is distinguishable from *Magner* and thoroughly consistent with it. In *Omeara***,** the officer observed behavior that was suspicious on its face, not explainable as "innocent" behavior. He saw several men talking, getting in and out of two cars, and switching cars. When the officer followed one of the cars, it made two illegal U-turns in heavy traffic and the officer lost track of the car temporarily. When he located the car, the other car joined it and they began traveling together.

During the traffic stop for the U-turns, the officer issued a written warning. The officer asked for consent to search, which was refused. The officer sniffed the outside of the trunk lid and detected the heavy odor of fabric softener, which he knew from his experience was used to mask the odor of marijuana. He continued to detain defendant for 45 to 50 minutes while a drug-sniffing dog was brought to the scene; when the dog alerted, the officer had probable cause to obtain a telephonic search warrant, and 349 pounds of marijuana were seized.[37]

In upholding the detention and search, the court quoted the dissent in *Magner* approvingly,[38] and this may be why some construe it as contrary to *Magner***.** But the fact is that *Omeara* does no damage to the holding in *Magner* – they just say the same things in different ways. Every observation the officer made in *Magner* had far more numerous innocent explanations than guilty ones. In *Omeara***,** the car-switching actions were patently suspicious, and the officer would have been dilatory had he not investigated further. There was no apparent innocent explanation for the car switching, and later, for the two cars to be separating, then rejoining one another. And the illegal U-turns were intrinsically "guilty" acts requiring at least an explanation from the operator.

Lastly: law enforcement officers are notorious for "backpedaling" at suppression hearings to remedy, in hindsight, any defect in the traffic stop. Search and seizure fact patterns are so fact-intensive that officers constantly tap-dance on the witness stand to save the state's case. Two things help here: first, make it clear *before* your pre-hearing interview that the officer had better review his departmental report and be prepared to make any changes at the interview. Plan your interview carefully and lock the officer into the facts and observations that indicate that he made the stop based on the drug courier profile. He won't want to admit it. Don't put words in his mouth and give him every opportunity to amend his report.

Second, you must believe that the officer on the witness stand is conversant, in a black-letter way, with the latest drug courier profile cases. Just as cops throw around terms like "plain view" and "exigent circumstances" without really knowing what they mean (except they heard them in cop school), the officer will know that he must somehow transform his inarticulate hunch into reasonable suspicion. Thus, your officer will borrow facts from recent case law and plug it into your client's traffic stop, whether it existed or not. This is why you should involve your client in the suppression hearing preparation; he may not even recognize himself in the police report. The circumstances may be that altered! In that event, you are not condemned to a "swearing contest," because the officer may have twisted the truth in such a way that it can be challenged by evidence that calls

the officer's testimony into question. For example, the officer might testify that your client did not make eye contact; you learn from your client that there was no eye contact because the client was wearing his only pair of prescription glasses – sunglasses – and you verify those are the only glasses impounded in his jail property.

CONCLUSION

Contrary to how it sometimes seems from the defense perspective, there is still something left to work with in motions to suppress drug evidence when the investigatory detention is based upon the drug courier profile. The recent cases, *Magner* and *Omeara*, are distinguishable from one another and completely compatible, and the newer case should not be construed to further erode the right to be free of unreasonable search and seizure.

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[1] Does anyone reading this know the author's name and exact quote?

[2] See generally, *Miles of White Lines: Use of the Drug Courier Profile by State Law Enforcement Agencies on the Highway as Reasonable Suspicion to Detain Motorists,* 30 Ariz. L. Rev. 949 (1988).

[3] "Our treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable." *United States v. Chadwick*, 433 U.S.1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977), citing *Cady v. Dombrowski,* 413 U.S. 433, 441-42 (1973), *Texas v. White,* 423 U.S. 67 (1975). And, "The answer lies in the diminished expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Id.,* citing *Cardwell v. Lewis,* 417 U.S. 583, 590 (1974).

[4] *United States v. Johnson,* 516 So. 2d 1015 (Fla. App. 1987)(upholding suppression of evidence seized pursuant to a drug courier profile stop).

[5] See generally, *Miles of White Lines: Use of the Drug Courier Profile by State Law Enforcement Agencies on the Highway as Reasonable Suspicion to Detain Motorists,* 30 Ariz. L. Rev. 949 (1988).

[6] *State v. Cohen,* 103 N.M. 558, 560, 711 P.2d 3, 5 (N.M. 1985).

[7] *Valcarcel v. S*tate, 718 S.W. 2d 359, 361 (Tex. 1986).

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[8] *Cohen*, 103 N.M. at 560, 711 P.2d at 5.

[9] *Valcarcel,* 718 S.W.2d at 362.

[10] *Id.*

[11] *Cohen*, 103 N.M. at 560, 711 P.2d at 5.

[12] *Id.*

[13] *Johnson,* 516 So. 2d at 1018.

[14] *State v. Magner*, 191 Ariz. 392, 956 P.2d 519 (1998). The officer did not cite speeding as a drug courier factor, but opined that drug couriers' cars are dirty because they "drive from Point A to Point B as fast as they can" without stopping to wash their cars.

[15] *Valcarcel,* 718 S.W.2d at 362.

[16] *Department of Highway Safety and Motor Vehicles v. Coleman,* 505 So.2d 668, 670 (Fla. App. 1987).

[17] *Id.*

[18] *Id.*

[19] *Johnson,* 516 So.2d at 1018.

[20] *United States v. Smith,* 799 F.2d 704, 706 (11th Cir. 1986).

[21] *Valcarcel,* 718 S.W.2d at 362.

[22] *State v. Magner,* 191 Ariz. 392, 956 P.2d 519 (1998)(detention and search suppressed).

[23] *Id.*

[24] *United States v. Baron,* 94 F.3d 1312, 1319 (9th Cir.), *cert denied* , ___ U.S. ___, 117 S.Ct. 624, 136 L.Ed. 2d 546 (1996).

[25] E.g., the outcome of *State v. Omeara*, 297 Ariz. Adv. Rep. 3 (Div. 2, April 27, 1999) would have been quite different if the officer had proceeded directly to a warrantless search on the basis of the odor of fabric softener.

[26] *United States v. Smith,* 799 F.2d 704, 707 (11th Cir. 1986). *But see State v. Cohen,* 103 N.M. 558, 711 P.2d 3 (1985), in which a match of seven profile characteristics did amount to reasonable suspicion to

detain the suspects after the lawful reason for the initial stop had expired.

[27] *United States v. Westerbann-Martinez*, 435 F. Supp. at 698.

[28] *Id.*

[29] 191 Ariz. 392, 956 P.2d 519 (App. 1998).

[30] 297 Ariz. Adv. Rep. 3 (Div. 2, April 27, 1999).

[31] 956 P.2d at 523.

[32] *Id*. at 524.

[33] *Id*. at 525. In an almost tongue-in-cheek aside, the court observed that cars that appeared "too clean" also were associated with drug couriers. *United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir.), *cert denied*, ___ U.S. ___, 117 S.Ct. 624, 136 L.Ed. 2d 546 (1996).

[34] 956 P.2d at 525.

[35] 956 P.2d at 527 [emphasis added].

[36] The *Omeara* court said that the holding in *Magner*, does not "mandate questioning by the officer during investigatory stop; rather, it simply permits or authorizes questioning." 297 Ariz. Adv. Rep. at 4. However, this reasoning fails because it is circular: the officer is permitted to question, and if he does not question, there is no basis for the continued detention.

[37] 297 Ariz. Adv. Rep. at 3.

[38] "We agree with the following observations by the dissent in *Magner:*

> When addressed individually, almost any factor short of a 10 pound bale of marijuana on the front seat of the vehicle may have an innocent explanation. . . . [T]he relevant inquiry is not whether the particular behavior is innocent or guilty, but rather the degree of suspicion that attaches to the particular types of non-criminal acts.

Omeara 297 Ariz. Adv. Rep. at 4, quoting *Magner*, 191 Ariz. at 401-02, 956 P.2d at 528-29 (Voss, J., dissenting).